Supreme Court, U. S.
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No. 76-1714

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

FRANK ROSENTHAL, *Appellant*,

v.

STATE OF NEVADA AND
STATE OF NEVADA GAMING COMMISSION, *Appellees*.

On Appeal from the Supreme Court of Nevada

REPLY MEMORANDUM FOR APPELLANT

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TABLE OF CONTENTS

	Page
I. Vagueness	2
II. Tenth Amendment	6
III. Judicial Review	9
IV. Denial of A Proper Hearing	11
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Adams v. *Tanner*, 244 U.S. 590 (1917) 8
Allgeyer v. *Louisiana*, 165 U.S. 578 (1897) 8
Andrews v. *Drew Municipal Separate School District*, 507 F.2d 611 (5th Cir. 1975) *certiorari dismissed as improvidently granted*, 425 U.S. 559 (1976) 3, 4
Armstrong v. *Manzo*, 380 U.S. 545 (1955) 11
Atlanta Bowling Center, Inc. v. *Allen*, 389 F.2d 713 (5th Cir. 1968) 3, 5
Bell v. *Burson*, 402 U.S. 535 (1971) 8
Birkenfield v. *United States*, 369 F.2d 491 (3rd Cir. 1966) 10
Board of Regents v. *Roth*, 408 U.S. 564 (1972) 10
Bryan v. *Austin*, 354 U.S. 933 (1957) 4
Cafeteria and Restaurant Workers Union, Local 473 v. *McElroy*, 367 U.S. 886 (1961) 11
California v. *LaRue*, 409 U.S. 109 (1972) 8
Carroll v. *President and Commissioners of Princess Anne*, 393 U.S. 175 (1968) 4
Christhilf v. *Annapolis Emergency Hospital*, 496 F.2d 174 (4th Cir. 1974) 10
Connally v. *General Construction Co.*, 296 U.S. 385 (1926) 6
Diffenderfer v. *Central Baptist Church*, 404 U.S. 412 (1972) 4
Doubles v. *Gragson*, 91 Nev. 301, 535 P.2d 677 (1975) .. 10
Goss v. *Lopez*, 419 U.S. 565 (1975) 11
Greyned v. *City of Rockford*, 408 U.S. 104 (1972) 6
Greene v. *McElroy*, 360 U.S. 474 (1959) 10

Page

Hall v. *Beals*, 396 U.S. 45 (1969) 4
Hornsby v. *Allen*, 326 F.2d 605 (5th Cir. 1964) 3, 5, 6
Lewis v. *City of Grand Rapids*, 356 F.2d 276 (6th Cir.), *cert. denied*, 395 U.S. 838 (1966) 5
Louisville and Nashville R.R. Co. v. *Schmidt*, 177 U.S. 230 (1900) 11
Miller v. *Carter*, 547 F.2d 1314 (7th Cir. 1977) (*per curiam*), *cert. granted sub. nom. Carter* v. *Miller*, April 18, 1977, Case No. 76-1171 5
Morrissey v. *Brewer*, 408 U.S. 471 (1972) 8
Mullane v. *Central Hanover Trust Co.*, 339 U.S. 306 (1950) 11
Paul v. *Davis*, 424 U.S. 693 (1976) 10
Power Manufacturing Co. v. *Saunders*, 274 U.S. 490 (1927) 8
Richardson v. *Wright*, 405 U.S. 208 (1972) 4
Sanks v. *Georgia*, 401 U.S. 144 (1971) 4
Schware v. *Board of Bar Examiners*, 353 U.S. 232 (1957) 4
Simon v. *Craft*, 182 U.S. 427 (1901) 12
United States v. *Alaska Steamship Co.*, 253 U.S. 113 (1920) 4
United States v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897) 4
Wisconsin v. *Constantieau*, 400 U.S. 433 (1971) 8
Wolff v. *McDonnell*, 418 U.S. 539 (1974) 8

STATUTES AND REGULATIONS:

U.S. Const. Amend. I 3
U.S. Const. Amend. X 4, 6, 7, 12
U.S. Const. Amend. XIV, § 1 ..... 5, 6, 7, 8, 9, 11, 12
NRS 463.140 ..... 2, 3, 4, 5, 6
NRS 463.170 ..... 2, 3, 4, 5
NRS 463.220 ..... 2, 3, 4, 5, 6
NRS 463.315 ..... 9, 10
Gaming Control Regulation 3.090 3

IN THE

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REPLY MEMORANDUM FOR APPELLANT

Appellees seek to minimize the importance of this case by beclouding the real substance of the decision of the court below, and by attempting to characterize the appellant as unsavory and unworthy. Labelling the holdings below as dictum or as alternative holdings, and the use of *ad hominem* arguments, to disparage what are indeed substantial federal questions, should not divert this Court from the significant issues raised by the decision below.

I.

VAGUENESS

The question whether NRS 463.140 and NRS 463.220 are unconstitutionally vague in that they lack ascertainable standards for the granting or denial of gambling license applications is a substantial federal question which is properly before this Court.[1] Appellees contend that because the court below stated that any indefiniteness or gaps in NRS 463.140 and NRS 463.220 were filled by regulations issued to implement the statute, the Supreme Court of Nevada's holding that these sections of the Nevada gambling laws are constitutional is an alternative holding. (Motion to Dismiss or Affirm, p. 11.) The statement of the court below that Gaming Commission regulations could cure any unconstitutional indefiniteness in NRS 463.140 and NRS 463.220 is not an alternate holding. It is merely an additional reason which the court below used to bolster its conclusion that these challenged sections of the Nevada gambling laws were constitutional. The court below made this clear when it said (App. A, p. 38):

> "We wish, however, explicitly to state that the statutory standards alone are sufficient. . ."

Appellees also contend that a recent revision to NRS 463.170 makes moot the question of the constitutionality of NRS 463.140 and NRS 463.220. (Motion to Dismiss or Affirm, pp. 11, 32.) This revision, which might be called the "Frank Rosenthal amendment," is clearly an *ex post facto* effort by the state to lift itself by its

[1] No question is raised in the Motion to Dismiss or Affirm as to the jurisdiction of this Court. The federal questions were considered and decided by the court below. See pp. 14, 16-18 of the Jurisdictional Statement for further discussion.

own bootstraps. Whatever its effect may be in the future, it was not applicable in the proceedings before the Board, the Commission, the district court or the court below. Even if it were applicable to this case, it is little more than a dressed up version of Gaming Commission Regulation 3.090, which appellant has argued is itself unconstitutionally vague, and which raises serious First Amendment questions.[2]

NRS 463.140 and NRS 463.220, the sections of the Nevada gaming laws which are at issue in this case, have not been revised. NRS 463.140 and NRS 463.220 provide that an application for a gaming license may be denied for "any cause deemed reasonable" by the Board or Commission. While paragraphs (a) and (b) of the revised version of NRS 463.170 suggest some criteria, the lack of specificity in NRS 463.140 and NRS 463.220 is emphasized by paragraph (c) of NRS 463.170 which provides that a license applicant must be qualified "in all other respects".[3] What this means

[2] Appellees appear to argue that, in the absence of a First Amendment issue and a criminal sanction, appellant's argument that NRS 463.140 and NRS 463.220 are unconstitutionally vague cannot be sustained. As *Hornsby* v. *Allen*, 326 F.2d 605 (5th Cir. 1964) and *Atlanta Bowling Center, Inc.* v. *Allen*, 389 F.2d 713 (5th Cir. 1968) indicate, this latter contention is patently incorrect. Moreover, as appellant has noted (Jurisdictional Statement, p. 21, n.15) Regulation 3.090 (now embodied in the revision to NRS 463.170) raises important First Amendment questions in that it disqualifies for licensing a person on the basis of associations, which is more than a marginal incursion on First Amendment freedoms.

[3] Paragraph (b) of the revision to NRS 463.170 refers to the "prior activities" and "criminal record" of a license applicant. Yet, the Court of Appeals for the Fifth Circuit has stated: "If the state investigates the moral character of an individual upon whom it intends either to bestow a benefit or to impose a burden, due process requires that such inquiry look to *present* moral character." *An-*

is nowhere specified. Thus, the Commission can continue to deny license applications pursuant to NRS 463.140 and NRS 463.220 for any cause it deems reasonable.

As in *Carroll* v. *President and Commissioners of Princess Anne,* 393 U.S. 175, 179 (1968), the "underlying question persists"—namely, the constitutionality of NRS 463.140 and NRS 463.220—and can be raised subsequently if appellant or others were to apply for licenses pursuant to NRS 463.140 and NRS 463.220. This Court has concluded that when underlying questions persist, in the face of changed circumstances, the case is not moot. *United States* v. *Trans-Missouri Freight Ass'n,* 166 U.S. 290 (1897). Moreover, the question of what procedures should be afforded to a license applicant, consistent with due process, is in no way changed by the revisions to NRS 463.170, nor is the question whether gaming regulation is so far reserved to the states by the Tenth Amendment that it need not meet federal constitutional standards. Thus, questions embodied in the decision below and the order of the Commission are not resolved, and the case is not moot.[4]

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drews v. *Drew Municipal Separate School District,* 507 F.2d 611, 614, n.6 (5th Cir. 1975), *certiorari dismissed as improvidently granted,* 425 U.S. 559 (1976), *citing Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957).

[4] The cases cited by appellees to support their contention are not analogous to the situation here. *Diffenderfer* v. *Central Baptist Church,* 404 U.S. 412 (1972) involved a request for a declaratory judgment, where, unlike here, no injury had yet occurred. *Hall* v. *Beals,* 396 U.S. 45 (1969), *Bryan* v. *Austin,* 354 U.S. 933 (1957), *United States* v. *Alaska Steamship Co.,* 253 U.S. 113 (1920), *Sanks* v. *Georgia,* 401 U.S. 144 (1971) and *Richardson* v. *Wright,* 405 U.S. 208 (1972) all involved situations in which the challenged

What remains at issue in this case is a state statute, regulating the grant or denial of gaming license applications, which fails to provide the specificity that the Due Process Clause of the Fourteenth Amendment requires. Appellant is an applicant for a license which, pursuant to that statute, can be denied for "any cause deemed reasonable" by the Gaming Control Board and Gaming Commission. That he is an applicant does not mean that the constitutionality of this statute should be judged by a more lenient standard than if appellant were a license holder, as appellees imply. *See Hornsby* v. *Allen,* 326 F.2d 605, 612 (5th Cir. 1964).[5] *Atlanta Bowling Center, Inc.,* v. *Allen,* 389 F.2d 713, 715-716 (5th Cir. 1968) does not disturb that conclusion, but reaffirms it.[6]

What remains true is that NRS 463.140 and NRS 463.220, regardless of the revision of NRS 463.170, is a statute "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its application,

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statute, order or regulation was itself entirely changed by a later enactment. Here, the challenged statutes, NRS 463.140 and NRS 463.220, have not been changed.

[5] *Cf. Miller* v. *Carter,* 547 F.2d 1314 (7th Cir. 1977) (per curiam), *cert. granted sub. nom. Carter* v. *Miller,* April 18, 1977, No. 76-1171.

[6] *Lewis* v. *City of Grand Rapids,* 356 F.2d 276, 289 (6th Cir.), *cert. denied,* 385 U.S. 838 (1966) similarly does not disturb that conclusion, because the court, while noting that some observations in *Hornsby* v. *Allen, supra,* were at odds with its conclusion and therefore that *Hornsby* would not be followed, *id.,* at 289, stated: "We hold only that the . . . Fourteenth Amendment to the United States Constitution [did not require] that the Grand Rapids City Commission hold a *full* due process hearing to consider Plaintiff Lewis' request for a transfer to him of a license then owned by another." *Id.,* at 285; emphasis added.

[which] violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926).[7]

The Court is properly presented with a live controversy over the constitutionality of a state statute which is both vague and standardless. In light of the number of states which are or have been legalizing gambling, this statute, which is the lynchpin for regulation of that industry by the state best known for permitting gambling, merits review by this Court.

II.

TENTH AMENDMENT

The holding of the court below that gaming is "a matter reserved to the states within the meaning of the Tenth Amendment" and that "Within this context we find no room for federally protected constitutional rights" (App. A, p. 40) raises an important federal question. The fact that the court below reviewed appellant's constitutional challenges to the Nevada gaming laws, as appellees concede, does not change this holding into dictum. Rather, the scope of the judicial review afforded confirms that the view of the court below in regard to the Tenth Amendment materially affected its conclusion. The court below found that NRS 463.140 and NRS 463.220 should be judged by

[7] The requirement of statutory specificity is designed, *inter alia*, to prevent selective and arbitrary enforcement or application, whether resulting from a "ward courtesy" system as in *Hornsby* v. *Allen*, *supra*, or for any other reason. It is the possibility of *ad hoc* and subjective decision-making that is the danger, not the political or bureaucratic process by which such decisions are made. It is such subjective decision-making that the due process requirement of specificity is designed to prevent. *See Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972).

state rather than federal constitutional standards, that these sections complied with the Nevada constitution, and that no federal question was presented. (App. A, p. 38, 40, 44). These are conclusions which can only be made because they follow inevitably from the novel, surprising, and faulty holding that, by virtue of the Tenth Amendment, a state is free to disregard federal constitutional requirements and protections in connection with the regulation of gambling. On this basis, the court below disposed of appellant's federal constitutional claims on what it called state constitutional grounds. It can hardly be considered—or camouflaged—as dictum.

Appellees contend that even if the Tenth Amendment views of the court below are neither dictum nor correct, the states bear primary responsibility for the regulation of gambling. (Motion to Dismiss or Affirm, p. 16-17.) It does not follow, however, as appellees imply, that state regulation of gambling is an area reserved exclusively to the states,[8] or that regulation of gambling can be permitted to meet only state rather than federal constitutional standards.[9] Federal constitu-

[8] *See* Jurisdictional Statement, pp. 23-24, n.17, for a compilation of federal court decisions where courts have declined to find gambling an area exclusively reserved to the states.

[9] Appellees reach this startling conclusion by arguing that the alleged absence of a liberty or property interest disqualifies appellant from Fourteenth Amendment due process protections. (Motion to Dismiss or Affirm, p. 17.) This characterization of the issue concedes, on the one hand, that state regulation of gambling must meet federal constitutional standards. On the other hand, it begs the question of the appropriate constitutional standard for the regulation of gambling by implying that this initial question cannot be reached unless there is an interest protected under the federal constitution.

tional requirements apply to state regulation of gambling as to other areas traditionally within the states' primary regulatory responsibility. *See e.g., California* v. *LaRue,* 409 U.S. 109, 115 (1972); *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971) (liquor licensing); *Wolff* v. *McDonnell,* 418 U.S. 539 (1974); *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) (prisoners in state prisons); *Bell* v. *Burson,* 402 U.S. 535, 539 (1971) (driver's license).

This Court has said:

> "Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guarantees of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

Adams v. *Tanner,* 244 U.S. 590, 594-595 (1917). Simply because the profession to be regulated is gambling, and thus the state police power is invoked, the state cannot abrogate the due process requirements of the federal constitution. Federal constitutional standards, notwithstanding the conclusion of the court below, apply to areas within the states' police power. *See, e.g., Allgeyer* v. *Louisiana,* 165 U.S. 578 (1897) (insurance); *Power Manufacturing Co.* v. *Saunders,* 274 U.S. 490, 495 (1927) ("It of course rests with the State to prescribe the venue of actions brought in her courts. But the exercise of this power, *as of all others,* must be in keeping with the limitations which the Constitution of the United States places on state action.") (emphasis added).

The novel holding of the court below, designed to prevent federal intrusion into gambling,[10] cannot be brushed aside as mere dictum. Nor can it be said to be simply a recital of existing law in regard to the states' role in the regulation of gambling. Rather, this unique and surprising holding raises the substantial questions whether the Fourteenth Amendment applies to gambling, and whether state regulation of gambling must meet federal or state constitutional standards. These questions warrant review by this Court.

III.

JUDICIAL REVIEW

The court below concluded that NRS 463.315 does not provide for judicial review of the denial of an application for a gambling license. (App. A, p. 36.) That conclusion is not disturbed because the court below went on to review and decide appellant's constitutional challenges. Were the present appellant, or another applicant to seek review of a gambling license denial, there is little doubt that Nevada courts would cite the decision of the court below for the proposition that NRS 463.315 precludes judicial review. Appellees should not be allowed to contend that this holding is not important because judicial review was provided, and then argue that the judicial review provided was

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[10] The Nevada Supreme Court stated: "It is apparent that if we were to recognize federal protections of this wholly privileged state enterprise, necessary state control would be substantially diminished and federal intrusion invited." (App. A, p. 40.)

not important because it resulted in mere alternate holdings or was only dictum.[11]

The conclusion of the court below that NRS 463.315 does not provide for judicial review is at odds with this Court's decisions. (Jurisdictional Statement, pp. 26-28.) Judicial review of administrative decisions is required when protected liberty or property interests are at stake. Appellant had such interests. (Jurisdictional Statement, pp. 28-29.) The denial of a license deprives appellant of a property interest in the future possibility of pursuing his chosen profession, *see Greene* v. *McElroy,* 360 U.S. 474 (1959), *Birkenfield* v. *United States,* 369 F.2d 491, 494 (3rd Cir. 1966), in his chosen geographical location, *see Christhilf* v. *Annapolis Emergency Hospital,* 496 F.2d 174, 178 (4th Cir. 1974). It deprives appellant of a liberty interest in that it "foreclosed his freedom to take advantage of other employment opportunities", *Board of Regents* v. *Roth,* 408 U.S. 564, 573 (1972), and injures his reputation. *Paul* v. *Davis,* 424 U.S. 693, 701 (1976). Thus, the decision of the court below contravenes the precedents established by this Court which require judicial review of administrative decisions which result in the deprivation of protected interests.

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[11] Appellees also try to have it both ways by arguing that in 1974 "47 percent of all State revenues were derived from licensed gambling" (Motion to Dismiss or Affirm, p. 2, n. 1), but that gambling in Nevada is not a "common occupation" entitled to the due process protections of the Fourteenth Amendment. (Motion to Dismiss or Affirm, p. 21.) Gambling is a legitimate occupation in Nevada. "The right to pursue a legitimate occupation is a fundamental right." *Doubles* v. *Gragson,* 91 Nev. 301, 535 P.2d 677 (1975).

IV.

DENIAL OF A PROPER HEARING

The quantum of due process protections to be afforded when liberty and property interests are at stake varies. *Cafeteria and Restaurant Workers Union, Local 473* v. *McElroy,* 367 U.S. 886 (1961). At a minimum, due process requires "notice and opportunity for hearing appropriate to the nature of the case." *Goss* v. *Lopez,* 419 U.S. 565, 579 (1975), *quoting Mullane* v. *Central Hanover Trust Co.,* 339 U.S. 306, 313 (1950). The procedures employed by the Nevada Gaming Commission failed to provide either. A 200-odd page transcript of the Gaming Control Board hearing made available 15 hours prior to the Gaming Commission hearing on appellant's license application raises serious questions as to what is constitutionally permissible notice. A hearing in which it was impossible to obtain critical witnesses for lack of time,[12] where there was no impartial decision-maker, nor a decision resting on substantial evidence, nor the cross-examination of witnesses whose statements deprive a person of his livelihood, raises important questions about what is a constitutionally permissible opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1955). The right to a hearing embraces an "adequate opportunity . . . to defend." *Louisville and Nashville R.R. Co.* v. *Schmidt,* 177 U.S. 230, 236 (1900). Whether this opportunity has been denied must be determined "by the

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[12] Despite appellees' contentions, the presence or testimony of important witnesses could have been obtained. (Jurisdictional Statement, p. 31, n.25). That the Commission provided a pale substitute for such important live testimony by permitting hearsay testimony is irrelevant.

substance of things and not by mere form." *Simon* v. *Craft*, 182 U.S. 427, 436 (1901). The hearing afforded appellant by the Gaming Commission was a triumph of form over substance. The question of the procedural protections which due process required that the appellant be afforded are not insubstantial; incursions on protected liberty and property interests lie beneath them.

CONCLUSION

The decision of the court below raises important questions about the scope and content of the Tenth Amendment and of the Due Process Clause of the Fourteenth Amendment. In view of the number of states which have legalized gaming, and of the importance of Nevada as a leader in that movement, these questions—substantial, significant, and troublesome—warrant review by this Court.

Respectfully submitted,

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